

**Mercy Hospital of Buffalo and Buffalo & Western
New York Hospital and Nursing Home Council,
AFL-CIO. Case 3-CA-9974**

March 19, 1981

DECISION AND ORDER

Upon a charge filed on September 2, 1980, by Buffalo & Western New York Hospital and Nursing Home Council, AFL-CIO, herein called the Union, and duly served on Mercy Hospital of Buffalo, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint on September 26, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 24, 1980, following a Board election in Case 3-RC-7660, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about August 7, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 7, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On November 14, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 21, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed an opposition to the Motion for Summary Judgment, and a motion for reconsideration.

Upon the entire record in this proceeding, the Board makes the following:

¹ Official notice is taken of the record in the representation proceeding, Case 3-RC-7660, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits most of the operative factual allegations of the complaint but denies that on December 27 and 28, 1979, a majority of the employees of Respondent in an appropriate unit designated and selected the Union as their representative; denies that at all times since July 24, 1980, the Union has been and is now the exclusive representative of its employees in an appropriate unit for purposes of collective bargaining; and denies that since on or about July 24, 1980, the Union has requested Respondent to recognize it as the exclusive collective-bargaining representative of Respondent's employees in an appropriate unit. In its statement in opposition to the Motion for Summary Judgment, Respondent incorporates the arguments it raised in the underlying representation proceeding. Specifically, it asserts that the Regional Director erred in sustaining the challenge to the ballot of Sister Mary Blanche on the basis that, as a member of the religious Order which effectively controls the operation of Mercy Hospital of Buffalo, Sister Mary Blanche is related to Respondent and, therefore, owes her allegiance and obedience to Respondent. Respondent also alleges that the Regional Director improperly relied on the fact that Sister Mary Blanche had made vows of poverty and obedience to the religious Order that effectively controls Mercy Hospital of Buffalo in concluding that she was, therefore, "related to the employer." The General Counsel contends that Respondent is improperly seeking to relitigate issues which were raised and decided in the underlying representation case. We agree.

Review of the record herein, including the record in Case 3-RC-7660, reveals that on December 27 and 28, 1979, an election was held in which the tally was 33 votes for the Union and 32 votes against the Union. There was one determinative challenged ballot. On February 1, 1980, the Regional Director issued a Report on Challenged Ballot in which he recommended sustaining the challenge to the ballot of Sister Mary Blanche. This recommendation resulted in the Union's receiving a majority of the valid ballots cast in the election.

Thereafter, Respondent filed exceptions to the Regional Director's report. On July 24, 1980, the Board adopted the Regional Director's findings and recommendations and issued a Certification of Representative in the unit described in the Stipulation for Certification Upon Consent Election.²

² See 250 NLRB 949 (1980). The Board also noted that, contrary to Respondent's assertions, the Regional Director did not rely on Sister

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As noted in its statement in opposition to the Motion for Summary Judgment and Motion for Reconsideration, Respondent again asserts that the Regional Director was in error in recommending that the challenge to the ballot of Sister Mary Blanche be sustained. It therefore appears that in this proceeding Respondent is attempting to relitigate issues fully litigated and finally determined in the representation proceeding. It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.³

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.⁴ Accordingly, we grant the Motion for Summary Judgment and deny Respondent's Motion for Reconsideration.⁵

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Mercy Hospital of Buffalo, a New York State corporation with its principal place of business lo-

located at 565 Abbott Road, Buffalo, New York, is engaged in the business of providing in-patient and out-patient health care and related services. During the 12-month period preceding issuance of the complaint it received gross revenues in excess of \$250,000 per year and received goods and materials at its Buffalo facility, valued in excess of \$5,000, directly from points located outside New York State.

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We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Buffalo & Western New York Hospital and Nursing Home Council, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time business office clerical employees including cashiers, file clerks, credit clerks, NCR operators, chief insurance clerks, general insurance clerks, admission clerks, and switchboard operators employed by the Employer at its 565 Abbott Road, Buffalo, New York, facility, excluding all licensed practical nurses and technical employees, service and maintenance employees, registered nurses, professional employees, accounts-payable clerks, casual employees, guards and supervisors as defined in the Act.

2. The certification

On December 27 and 28, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 3, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 24, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

Mary Blanche's obedience, her vow of poverty, or the ultimate disposition of her salary in recommending her exclusion from the unit.

³ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁴ Member Zimmerman, who did not participate in the underlying representation proceeding, concurs in the result. See *Bravos Oldsmobile, Inc.*, 254 NLRB No. 135 (1981).

⁵ As noted, *supra*, Respondent denies that on December 27 and 28, 1979, a majority of the employees of Respondent in an appropriate unit designated and selected the Union as their representative for purposes of collective bargaining. To the extent that in this denial Respondent is denying the fact of this event, the record includes the tally of ballots signed by Respondent, and the Regional Director's Report on Challenged Ballots served on Respondent, which lists the election dates as December 27 and 28, 1979. Respondent has not denied the authenticity and accuracy of these documents; accordingly, we find the relevant complaint allegation to be established as true.

Respondent also denies the allegation that, since July 24, 1980, the Union has requested it to bargain as the employees' exclusive bargaining representative. The General Counsel has presented no evidence of such a request but has presented a letter, dated August 7, 1980, from Respondent to the Union which indicated that Respondent refused to bargain with the Union because it deemed the Board's certification in error. On the basis of this letter, we find that Respondent placed the Union on notice that a request for bargaining by the Union would have been futile and was therefore unnecessary. See, e.g., *B. F. Goodrich Company*, 250 NLRB 1139 (1980).

B. Respondent's Refusal To Bargain

Commencing on or about August 7, 1980, and at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Mercy Hospital of Buffalo is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Buffalo & Western New York Hospital and Nursing Home Council, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time business office clerical employees including cashiers, file clerks, credit clerks, NCR operators, chief insurance clerks, general insurance clerks, admission clerks, and switchboard operators employed by the Employer at its 565 Abbott Road, Buffalo, New York, facility, excluding all licensed practical nurses and technical employees, service and maintenance employees, registered nurses, professional employees, accounts-payable clerks, casual employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 24, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 7, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Mercy Hospital of Buffalo, Buffalo, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Buffalo & Western New York Hospital and Nursing Home Council, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time business office clerical employees including cashiers,

file clerks, credit clerks, NCR operators, chief insurance clerks, general insurance clerks, admission clerks, and switchboard operators employed by the Employer at its 565 Abbott Road, Buffalo, New York, facility, excluding all licensed practical nurses and technical employees, service and maintenance employees, registered nurses, professional employees, accounts-payable clerks, casual employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at 565 Abbott Road, Buffalo, New York, copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Buffalo & Western New York Hospital and Nursing Home Council, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time business office clerical employees including cashiers, file clerks, credit clerks, NCR operators, chief insurance clerks, general insurance clerks, admission clerks, and switchboard operators employed at our 565 Abbott Road, Buffalo, New York, facility, excluding all licensed practical nurses and technical employees, service and maintenance employees, registered nurses, professional employees, accounts-payable clerks, casual employees, guards and supervisors as defined in the Act.

MERCY HOSPITAL OF BUFFALO